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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 200

NORMAN H. STONE, MARVIN N. STONE, AND JEROME H. STONE, JR., DOING BUSINESS AS J. H. STONE & SONS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

LEWIS F. JACOBSON,
DAVID SILBERT,
Counsel for Petitioners.

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

MAY IT PLEASE THE COURT:

Petitioners, NORMAN H. STONE, MARVIN N. STONE and JEROME H. STONE, JR., doing business as J. H. STONE & SONS, respectfully petition this Honorable Court for a Writ of Certiorari to review a decree of the Circuit Court of Appeals for the Seventh Circuit enforcing an order of the National Labor Relations Board.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The decree and opinion involve the question of the constitutional right of an employer to enter into individual contracts of employment with his employees if the terms of such individual contracts do not deprive the employees of their rights to collective bargaining or self organization. The decree also involves the employer's right of free speech. The decree denies petitioners such rights in perpetuity.

Individual Contracts.

The decree requires that petitioners:

> "cease and desist from: * * * Giving effect to the individual contracts of employment, or any modification, continuation, extension or renewal thereof, or entering into a similar form of contract with their employees for any period subsequent to the date of this decree."

The Circuit Court of Appeals found that the following adjustment clause of the individual contract "constitutes a violation of the Act *per se*":

> "ADJUSTMENTS. The Company will endeavor to adjust with the Employee all complaints and disputes by negotiation, if possible. If it cannot be so adjusted, the Employee hereby selects .....as his representative and arbitrator, and the Company selects its superintendent as its representative, and they shall promptly hear and adjust all such complaints, or failing to do so shall select a third disinterested arbitrator, which three shall promptly hear, adjust and arbitrate every such complaint or dispute. The decision of a majority of such Board to be final on both Employee and Employer."

The Circuit Court of Appeals entered such decree despite the **undisputed** facts that:

(a) the employees exercised complete freedom of choice in accepting or rejecting the offered individual contract;

(b) each employee understood that the contract, including the arbitration clause, was not a substitute for a union agreement;

(c) each employee understood that he had the right to join or not join a labor union;

(d) each employee understood that he could belong to a union regardless of his accepting the individual contract;

(e) the adjustment clause in the contract was never asserted by the employer as a bar to collective bargaining;

(f) in a prior proceeding involving the same parties, the Board had specifically found and publicly published the fact that the individual contracts were *not* a bar to collective bargaining;

(g) the individual contracts were discussed at a union meeting and the employees who attended were advised by the union that the individual contracts meant nothing.

(h) the employees read the contract carefully before signing it and understood that it did not in any way interfere with or restrain them in the exercise of their collective bargaining rights.

(i) there was no claim by the union that the individual contracts interfered with the union membership but on the contrary, eight months after the offer of the individual contracts, the union claimed to represent a majority of the employees.

(j) the Board or union did not charge that the employer refused to collectively bargain.

The Court in its opinion distinguished between the validity of adjustment clauses in collective bargaining contracts and in individual contracts, stating at page 756 of its opinion (125 F. (2)):

> "It is pointed out by respondents that this is a form of arbitration clause often found in contracts between a union and an employer. We assume, however, that under such circumstances, the arbitration clause is the result of an agreement reached with the duly selected bargaining agent of the employees. Such action is in conformity with the Act, but must be distinguished from the instant case where the clause was agreed to as a result of individual action * * *"

Free Speech.

The decree and opinion of the Court also involve the question of the constitutional right of free speech on the part of an employer. The decree denies petitioners such right in that the decree requires that petitioners:

> "cease and desist from: (1) (a) interrogating their employees as to their union affiliation or activities."

Circuit Judge Major, who wrote the opinion in the instant case, dissented from the inclusion of such provision in the Court's decree. The decree, when entered on April 8, 1942, over objection of petitioners, was signed by Circuit Judges Kerner and Minton of the United States Circuit Court of Appeals for the Seventh Circuit, and the following notation is entered upon said decree:

> "I do not approve this decree. In my opinion Paragraph 1(a) should be eliminated. * * *"

This notation was signed by Judge Major.

Judge Major, in writing the opinion of the court, stated:

> "In the beginning we note the stress which respondents place upon their background for fair dealing with their employees, union and non-union alike. It is pointed out that the employees were at no time restrained from a free discussion of their union activities and that no employee was discriminated against, laid off or discharged because of union activity or membership.
>
> "Undoubtedly, such a situation is commendable and entitled to consideration in cases of some character, just as it is given consideration when the employer's background is shown to be hostile to the union. In a situation such as here presented, however, the background is of minor importance for the reason that the matters in controversy are dependent largely upon a construction of speeches, interviews and written documents."

In reference to such speech and to the letters of petitioners to their employees, Judge Major, in his opinion states:

> "The Labor Act was read and explained and we think it must be said that the employees, in a general way, were given a rather accurate statement as to their rights under the Act."
>
> * * *
>
> "Here again the employees were told of their rights under the Act."
>
> * * *
>
> "Again we think it must be said that the employees were fairly apprised of their legal rights."

BASIS OF JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under: (a) Sections 239 and 240 of the Judicial Code as amended on February 13, 1925, (U.S.C., Title 28, Secs. 346 and 347); (b) Sec. 10-e of the National Labor Relations Act (49 Stat. 449); and (c) the decree of the Circuit Court of Appeals sought to be reversed, which was entered on April 8, 1942.

THE QUESTIONS PRESENTED.

(1) Do the words of Sections 7 and 8 (1) of the National Labor Relations Act,

> "It shall be an unfair labor practice for an employer (a) to interfere with, restrain or coerce employees in the rights * * * ('to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.')",

(a) Give the National Labor Relations Board jurisdiction over written individual contracts, notwithstanding that the terms of such contracts do not deprive the employees of any of their rights to collective bargaining or self organization? (The Circuit Court of Appeals so held).

(b) Give the National Labor Relations Board any jurisdiction or power to prohibit an employer in perpetuity from entering into individual contracts to take effect *in futuro*? (The Circuit Court of Appeals so held).

(c) Prohibit an optional adjustment clause limited to adjustment of disputes arising under the individual contract? (The Circuit Court of Appeals so held).

2. Does such a construction of the language of Sections 7 and 8(1) of the Act, by the Circuit Court of Appeals for the Seventh Circuit, violate the First and Fourteenth Amendments of the Constitution of the United States?

3. Is it an unfair labor practice for an employer, when there is disruption of production in his plant, and a crescendo of arguments and fist fights among his employees relative to employees' rights, to exercise his constitutional right by a speech to his employees upon the subject of labor relations, explaining the rights of employees under the law, where no contention is made that any statements of the employer were untrue, and where there were no threats of economic reprisal accompanying or following the speech?

4. Does the fact that a labor organization is conducting an organizational campaign among employees vitiate the employer's constitutional rights of freedom of speech and freedom of individual contract?

5. When a union claiming bargaining rights has refused to allow the employer to check the union membership cards for authenticity of signature, and when the National Labor Relations Board has ordered an investigation to be made into the question of the collective bargaining agent of the employees, and where the employer has informed the union that the employer would recognize the union as a collective bargaining agent if there was due proof of the union's assertion that it represented a majority of the employees, does the employer have the right to investigate these facts for himself by merely asking his employees if they belong to the union and if they wanted the union to represent them, without any direct or indirect threat of economic reprisals or coercion, and with the employees being told at the same time that they had a right to join or not join any union?

6. Is the doctrine of *res adjudicata* or estoppel applicable to previous findings of fact and conclusions of law by the National Labor Relations Board in a prior proceeding involving the same parties and the same issues?

7. Is a Circuit Court of Appeals bound by the findings of the National Labor Relations Board where "the matters in controversy are dependent largely upon a construction of speeches, interviews and written documents"?

8. Does a *general* finding by the National Labor Relations Board that an employer violated Section 7 of the Act constitute a finding that there was a "plan" by the employer to defeat a union within the meaning of this court's decision in *N. L. R. B.* v. *Virginia Electric & Power Company*, 314 U. S. 469?

9. Is a general finding by the National Labor Relations Board that an employer violated Section 7 of the Act supported by substantial evidence if the Board solely relies for such a finding upon a speech and letters to employees from the employer, and all the uncontradicted evidence discloses that the total activities of the employer did not restrain or coerce his employees in their "free choice" under the Act?

REASONS FOR THE ALLOWANCE OF THE WRIT.

(1) This Court has never directly passed upon the constitutional question of the right of an employer to enter into written individual employment contracts with employees, where the employer is not contaminated by any company-dominated union or refusal to bargain collectively, and where the terms of such contracts do not deprive the employees of any of their rights under the Act.

(2) The decree of the Circuit Court of Appeals in this case, perpetually prohibiting the right of individual contract, is in conflict with the decisions of this Court in the

cases of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45; *Schneider* v. *State*, 308 U. S. 147; *Near* v. *State of Minnesota*, 283 U. S. 697, 714; *Patterson* v. *Colorado*, 205 U. S. 456, 462; and is in conflict with the following cases of other Circuit Courts of Appeals: *National Labor Relations Board* v. *Sterling Electric Motors, Inc.*, 109 F. (2) 194 (CCA 9); *P. & O. Steamship Co.* v. *National Labor Relations Board*, 98 F. (2) 411 (CCA 5); *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 90 F. (2) 520 (CCA 3) Cert. Den. 302 U. S. 738, and *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2) 153, 164 (CCA 9).

(3) The decree of the Circuit Court of Appeals misinterprets the decision of this Court in the case of *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, and is in direct conflict with the interpretation of the *National Licorice* case given by the Ninth Circuit in the case of *National Labor Relations Board* v. *Sterling Electric Motors, Inc.*, 112 F. (2) 63, 68 (CCA 9) which held that this Court struck down the individual contracts in the *National Licorice* case because "on their face" they showed agreements in violation of the Act.

(4) The decree and opinion of the Circuit Court of Appeals in this case is in direct conflict with the decision of this Court in the case of *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469.

(5) The decree and opinion of the Circuit Court of Appeals in this case, perpetually enjoining an employer from speaking with his employees, is in direct conflict with the reasoning of this Court in the cases of *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Cantwell* v. *State of Connecticut*, 310 U. S. 296; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, and *American Federation of Labor* v. *Swing*, 312 U. S. 321; and is in direct conflict with the decisions of

other Circuit Courts of Appeals: *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905 (CCA 6); *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800 (CCA 6); *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2) 153 (CCA 9), and *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 F. (2) 85, 89 (CCA 5).

(6) The effect of the Court's opinion is to limit the right of free speech and the right to individual contract. It raises for the first time, in sharp relief, the extent, if any, to which the constitutional guaranty of freedom of speech and freedom of contract was and could be impaired by Congress and the National Labor Relations Act. A clear-cut decision on the proper construction of the meaning of the words, "interfere, restrain or coerce," used in Section 8(1) of the Act, with reference to the constitutional right of freedom of contract and freedom of speech, if of vital national importance to the entire country, as well as to all employees, employers, and labor organizations. This is especially true during these times requiring the effective operation of the country's war program. If the opinion of the Circuit Court of Appeals for the Seventh Circuit is allowed to stand unchallenged by this Court, the constitutional right of freedom of speech and freedom of contract in labor matters is left in a maze of hopeless confusion and chaos, which this Court can and should avoid by the exercise of its power of supervision.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari issue out of and under the seal of this Court to review the decree of the Circuit Court of Appeals for the Seventh Circuit, and that the decree be reversed.

LEWIS F. JACOBSON,
DAVID SILBERT,
Counsel for Petitioners.